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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 SHAWNA L. MARTIN,)
8 Plaintiff,) No. CV-08-00180-JPH
9 v.) ORDER GRANTING DEFENDANT'S
10 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
11 of Social Security,)
12 Defendant.)
13

14 BEFORE THE COURT are cross-motions for summary judgment noted
15 for hearing without oral argument on March 6, 2009. (Ct. Rec. 14,
16 17). Attorney Maureen J. Rosette represents Plaintiff; Special
17 Assistant United States Attorney David J. Burdett represents the
18 Commissioner of Social Security ("Commissioner"). The parties
19 have consented to proceed before a magistrate judge. (Ct. Rec. 8.)
20 On March 2, 2009, plaintiff filed a reply. (Ct. Rec. 19.) After
21 reviewing the administrative record and the briefs filed by the
22 parties, the court **GRANTS** Defendant's Motion for Summary Judgment
23 (Ct. Rec. 17) and **DENIES** Plaintiff's Motion for Summary Judgment
24 (Ct. Rec. 14.)

25 **JURISDICTION**

26 Plaintiff protectively filed an application for Supplemental
27 Security Income (SSI) benefits on May 20, 2004, alleging onset as
28 of September 4, 2002. (Tr. 49-50.) The application was denied

1 initially and on reconsideration. (Tr. 37-38, 40-43.)
2 Administrative Law Judge (ALJ) John R. Crickman held a hearing on
3 September 18, 2006. (Tr. 338-376.) Plaintiff, represented by
4 counsel, was the sole witness. On March 5, 2007, the ALJ issued a
5 decision finding plaintiff not disabled. (Tr. 26.) The Appeals
6 Council denied a request for review on May 8, 2008. (Tr. 5-7.)
7 Therefore, the ALJ's decision became the final decision of the
8 Commissioner, which is appealable to the district court pursuant
9 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
10 review pursuant to 42 U.S.C. § 405(g) on June 9, 2008. (Ct. Rec.
11 2. 4.)

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing
14 transcript, the ALJ's decision, the briefs of both Plaintiff and
15 the Commissioner, and will only be summarized here.

16 Plaintiff was 38 years old at the time of the decision. She
17 has a high school education. It is unclear whether she completed
18 training in diesel technology in 1989. (Tr. 58; 190.) She has
19 worked as a medical assistant, file clerk, sales person, and in
20 home care provider. (Tr. 53, 61.) Plaintiff alleges disability
21 as of the amended onset date of May 20, 2004, due to bipolar
22 disorder and pain. (Tr. 39, 52.) Plaintiff testified she can sit
23 for 20 minutes, stand 10 minutes, walk 7-8 blocks or one-half
24 mile, and has been told to limit lifting to 20 pounds. (Tr. 24,
25 referring to Tr. 345, 351-352.)

26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the "Act") defines "disability"
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1 as the "inability to engage in any substantial gainful activity by
2 reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or
4 can be expected to last for a continuous period of not less than
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
6 Act also provides that a Plaintiff shall be determined to be under
7 a disability only if any impairments are of such severity that a
8 plaintiff is not only unable to do previous work but cannot,
9 considering plaintiff's age, education and work experiences,
10 engage in any other substantial gainful work which exists in the
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
12 Thus, the definition of disability consists of both medical and
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
14 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled.
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
18 is engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
20 not, the decision maker proceeds to step two, which determines
21 whether plaintiff has a medically severe impairment or combination
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination
25 of impairments, the disability claim is denied. If the impairment
26 is severe, the evaluation proceeds to the third step, which
27 compares plaintiff's impairment with a number of listed
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1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled.
6 If the impairment is not one conclusively presumed to be
7 disabling, the evaluation proceeds to the fourth step, which
8 determines whether the impairment prevents plaintiff from
9 performing work which was performed in the past. If a plaintiff
10 is able to perform previous work, that Plaintiff is deemed not
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
12 At this step, plaintiff's residual functional capacity ("RFC")
13 assessment is considered. If plaintiff cannot perform this work,
14 the fifth and final step in the process determines whether
15 plaintiff is able to perform other work in the national economy in
16 view of plaintiff's residual functional capacity, age, education
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. The burden
25 then shifts, at step five, to the Commissioner to show that (1)
26 plaintiff can perform other substantial gainful activity and (2) a
27 "significant number of jobs exist in the national economy" which
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1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
2 Cir. 1984).

3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
6 the Commissioner's decision, made through an ALJ, when the
7 determination is not based on legal error and is supported by
8 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
9 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
10 1999). "The [Commissioner's] determination that a plaintiff is
11 not disabled will be upheld if the findings of fact are supported
12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
13 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
15 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
18 573, 576 (9th Cir. 1988). Substantial evidence "means such
19 evidence as a reasonable mind might accept as adequate to support
20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
21 (citations omitted). "[S]uch inferences and conclusions as the
22 [Commissioner] may reasonably draw from the evidence" will also be
23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
24 On review, the Court considers the record as a whole, not just the
25 evidence supporting the decision of the Commissioner. *Weetman v.*
26 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
27 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

1 It is the role of the trier of fact, not this Court, to
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
3 evidence supports more than one rational interpretation, the Court
4 may not substitute its judgment for that of the Commissioner.
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
6 (9th Cir. 1984). Nevertheless, a decision supported by
7 substantial evidence will still be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the
9 decision. *Browner v. Secretary of Health and Human Services*, 839
10 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
11 evidence to support the administrative findings, or if there is
12 conflicting evidence that will support a finding of either
13 disability or nondisability, the finding of the Commissioner is
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
15 1987).

16 ALJ'S FINDINGS

17 At the hearing plaintiff amended her onset date to May 20,
18 2004. (Tr. 359-360.) The ALJ found at step one that plaintiff
19 has not engaged in substantial gainful activity since onset. (Tr.
20 18.) At steps two and three, the ALJ found that plaintiff suffers
21 from neck and shoulder pain, migraine headaches, mood disorder,
22 and personality disorder, impairments that are severe but do not
23 meet or medically equal the requirements of the Listings. (Tr.
24 18-22.) After finding plaintiff not fully credible, the ALJ
25 determined plaintiff has the RFC to perform a wide range of light
26 work. (Tr. 24-25.) At step four, the ALJ found a person with
27 plaintiff's impairments and background could perform her past
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1 relevant work as a medical records clerk and sales person. (Tr.
2 25.) Because she can perform past work, the ALJ found plaintiff
3 not disabled at step four. (Tr. 25-26.) This finding made step
4 five unnecessary.

5 ISSUES

6 Plaintiff contends that the Commissioner erred in his
7 assessment of the opinion of Dennis Pollack, Ph.D., and failed to
8 consult a vocational expert; and, a VE's report prepared after the
9 ALJ's decision requires reversal. (Ct. Rec. 15 at 7-11.) The
10 Commissioner responds that the ALJ properly weighed the medical
11 evidence and was not required to consult a vocational expert prior
12 to deciding at step four that plaintiff is able to perform past
13 relevant work. The Commissioner further responds that plaintiff
14 fails to show that the post-decision evidence was unavailable
15 earlier. (Ct. Rec. 18 at 6-16.)

16 DISCUSSION

17 A. Assessing medical evidence

18 In social security proceedings, the claimant must prove the
19 existence of a physical or mental impairment by providing medical
20 evidence consisting of signs, symptoms, and laboratory findings;
21 the claimant's own statement of symptoms alone will not suffice.
22 20 C.F.R. § 416.908. The effects of all symptoms must be
23 evaluated on the basis of a medically determinable impairment
24 which can be shown to be the cause of the symptoms. 20 C.F.R. §
25 416.929. Once medical evidence of an underlying impairment has
26 been shown, medical findings are not required to support the
27 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
28 341, 345 (9th Cr. 1991).

1 A treating physician's opinion is given special weight
2 because of familiarity with the claimant and the claimant's
3 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
4 Cir. 1989). However, the treating physician's opinion is not
5 "necessarily conclusive as to either a physical condition or the
6 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
7 751 (9th Cir. 1989) (citations omitted). More weight is given to
8 a treating physician than an examining physician. *Lester v.*
9 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
10 weight is given to the opinions of treating and examining
11 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
12 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
13 physician's opinions are not contradicted, they can be rejected
14 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
15 If contradicted, the ALJ may reject an opinion if he states
16 specific, legitimate reasons that are supported by substantial
17 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
18 F. 3d 1435, 1463 (9th Cir. 1995).

19 In addition to the testimony of a nonexamining medical
20 advisor, the ALJ must have other evidence to support a decision to
21 reject the opinion of a treating physician, such as laboratory
22 test results, contrary reports from examining physicians, and
23 testimony from the claimant that was inconsistent with the
24 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
25 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
26 Cir. 1995).

27 The ALJ considered the September 9, 2006, opinion (more than
28 two years post onset) of examining psychologist Dennis R. Pollack,

1 Ph.D. (Tr. 21-22, 25, referring to Tr. 189-199.) The ALJ rejected
2 Dr. Pollack's assessed marked and moderate limitations as
3 inconsistent with (1) the psychologist's own testing resting
4 results, including the WAIS-III (indicating average intellectual
5 functioning); (2) his assessed GAF of 60 indicating only moderate
6 impairment in social or occupational functioning; and (3) his
7 observations of plaintiff's daily activities. The ALJ also notes
8 that Dr. Pollack's assessed limitations appear based on
9 plaintiff's self-reported manic episodes, and the ALJ found
10 plaintiff not fully credible. (Tr. 21-22, 25). Plaintiff argues
11 the ALJ failed to properly reject Dr. Pollack's opinion. (Ct.
12 Rec. 15 at 9-10.)

13 Dr. Pollack administered tests, reviewed extensive medical
14 records from treating provider James F. Pittman, ARNP, Ph.D.,
15 and interviewed plaintiff. (Tr. 189-199.) On September 9, 2006,
16 he assessed a marked limitation in the ability to perform
17 activities within a schedule, maintain regular attendance, and be
18 punctual within customary tolerances. (Tr. 197.) He assessed
19 moderate limitations in the ability to maintain attention and
20 concentration for extended periods, and in the ability to complete
21 a normal workday and work week without interruptions from
22 psychologically based symptoms and to perform at a consistent pace
23 without an unreasonable number and length of rest periods. (Tr.
24 197.)

25 The activities plaintiff described to Dr. Pollack included
26 the responsibility of caring for five small children, ages 2
27 through 16; having completed 1 ½ years of a diesel mechanic
28 program after high school; cooking; performing all normal

1 household chores; taking a 2006 vacation to Seattle for a family
2 wedding; and drawing. (Tr. 190, 192.)

3 The ALJ evaluated plaintiff's credibility and found her less
4 than fully credible. (Tr. 24-25.) Credibility determinations
5 bear on evaluations of medical evidence when an ALJ is presented
6 with conflicting medical opinions or inconsistency between a
7 claimant's subjective complaints and diagnosed condition. See
8 *Webb v. Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

9 It is the province of the ALJ to make credibility
10 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
11 1995). However, the ALJ's findings must be supported by specific
12 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
13 Cir. 1990). Once the claimant produces medical evidence of an
14 underlying medical impairment, the ALJ may not discredit testimony
15 as to the severity of an impairment because it is unsupported by
16 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
17 1998). Absent affirmative evidence of malingering, the ALJ's
18 reasons for rejecting the claimant's testimony must be "clear and
19 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
20 "General findings are insufficient: rather the ALJ must identify
21 what testimony not credible and what evidence undermines the
22 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
23 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

24 The ALJ relied on several factors when he assessed
25 credibility, including plaintiff's statements which are not
26 supported by the opinion of her treating physician, daily
27 activities inconsistent with the degree of impairment alleged, and
28 inconsistently reporting her medical history. (Tr. 21, 24-25.)

1 The ALJ is correct that Dr. Pollack's assessed limitations
2 are inconsistent with the activities noted in his own report. His
3 assessed marked limitation in the ability to perform activities
4 within a schedule, for example, is contradicted by plaintiff's
5 daily routine of getting her children up, ready, and off to
6 school. The ALJ is also correct that the GAF¹ of 60 assessed by
7 Dr. Pollack and others does not support the level of impairment
8 indicated in the check box form.

9 The ALJ accurately points out that plaintiff's treating
10 psychiatrist, Paul Morrison, M.D., opined on May 24, 2004 (four
11 days after onset), that plaintiff could work. He assessed a GAF
12 of 60-65². (Tr. 221.) Similarly, on May 11, 2004, treating Nurse
13 Pittman opined, with respect to physical limitations, that
14 plaintiff could perform light work. (Tr. 134.) When weighing
15 examining Dr. Pollack's opinion, the ALJ properly gave the
16 opinions of the treating professionals, including Dr. Morrison,
17 greater weight than that of the examining and consulting health
18 care professionals.

19 The ALJ is correct too that plaintiff's activities,

21 ¹A Global Assessment of Functioning (GAF) of 51 to 60 indicates
22 moderate symptoms (e.g., flat affect and circumstantial speech,
23 occasional panic attacks or moderate difficulty in social,
24 occupational or school functioning (e.g., few friends, conflicts
with peers or co-workers).
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH
EDITION (DSM-IV), at p.32.

25 ²A GAF of 61-70 indicates some mild symptoms (e.g., depressed
26 mood and mild insomnia) or some difficulty in social, occupational
27 or school functioning (e.g., occasional truancy,
28 or theft within the household) but generally functioning
pretty well, has some meaningful interpersonal relationships.
(DSM-IV) at p. 32.

1 particularly as a single parent, of caring for five children
2 undermine her disability claim. *See Rollins v. Massanari*, 261
3 F.3d 853, 857 (9th Cir. 2001).

4 The ALJ relied on plaintiff's inconsistent statements to
5 medical providers when he assessed her credibility. The ALJ notes
6 plaintiff told Dr. Pollack in 2006 she was knocked out in the
7 second grade when she fell on the playground, causing her to go in
8 and out of consciousness for several hours. (Tr. 21, referring to
9 Tr. 191). The ALJ observes that in May of 2004, plaintiff denied
10 suffering any closed head injury. (Tr. 19, referring to Tr. 219.)
11

12 The ALJ's reasons for finding plaintiff less than fully
13 credible are clear, convincing, and fully supported by the record.
14 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9th Cir.
15 2002)(proper factors include inconsistencies in plaintiff's
16 statements, inconsistencies between statements and conduct, and
17 extent of daily activities).

18 The ALJ is responsible for reviewing the evidence and
19 resolving conflicts or ambiguities in testimony. *Magallanes v.*
20 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
21 trier of fact, not this court, to resolve conflicts in evidence.
22 *Richardson*, 402 U.S. at 400. The court has a limited role in
23 determining whether the ALJ's decision is supported by substantial
24 evidence and may not substitute its own judgment for that of the
25 ALJ, even if it might justifiably have reached a different result
26 upon de novo review. 42 U.S.C. § 405 (g).

27 The ALJ provided clear and convincing reasons for finding
28 plaintiff's allegations not fully credible. The ALJ's

1 assessment of Dr. Pollack's opinion is supported by the record
2 and free of legal error.

3 **B. Vocational expert**

4 Plaintiff alleges the ALJ erred by failing to contact a
5 vocational expert prior to finding at step four that she is able
6 to perform past relevant work, and by disregarding the post-
7 decision report of vocational expert Ellen Nagourney. (Ct. Rec.
8 15 at 11.)

9 Plaintiff bears the burden at step four of showing she is
10 unable to perform past relevant work. See e.g., *Rhinehart v.*
11 *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Kail v. Heckler*, 722 F.
12 2d 1496, 1498 (9th Cir. 1984) (burden of proof is claimant's at
13 steps 1-4, and shifts to the Commissioner at step five).
14 Plaintiff failed to meet her burden at step four. The ALJ was not
15 required to take the testimony of a vocational expert prior to his
16 step four determination because plaintiff failed to show she was
17 unable to perform past work.

18 With respect to Ms. Nagourney's report, the Commissioner is
19 correct that the court may remand based on post-decision evidence
20 only if plaintiff shows good cause for failing to produce the
21 evidence earlier and that the evidence is material. (Ct. Rec. 18
22 at 14, citing 42 U.S.C. § 405(g); *Mayes v. Massanari*, 276 F.3d
23 453, 462 (9th Cir. 2001). Even if the report is considered
24 material, plaintiff does not establish good cause for failing to
25 produce it until after the ALJ's adverse decision.

26 **CONCLUSION**

27 Having reviewed the record and the ALJ's conclusions, this
28 court finds that the ALJ's decision is free of legal error and

1 supported by substantial evidence..

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
6 **DENIED.**

7 The District Court Executive is directed to file this Order,
8 provide copies to counsel for Plaintiff and Defendant, enter
9 judgment in favor of Defendant, and **CLOSE** this file.

10 DATED this 9th day of March, 2009.

11 s/ James P. Hutton

12 JAMES P. HUTTON
13 UNITED STATES MAGISTRATE JUDGE
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